BOARD OF ALIEN LABOR CERTIFICATION APPEALS
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'**Notice: This is an electronic bench opinion which has not been verified as official**'
DATE: 10/06/97

CASE NO: 96-INA-151

In the Matter of:

CLARO AND NANETTE RODRIGUEZ
Employer,

On Behalf of:

ALFONISTA GUINOCOR
Alien

Appearance: Harry Spar, Esq.
New York, New York,
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Alfonsita Guinocor("Alien") filed by Employer Claro and Nanette Rodriguez ("Employer") pursuant to §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, New York, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

STATEMENT OF THE CASE

On November 7, 1994, the Employer filed an application for labor certification to enable the Alien, a Philippines national, to fill the position of Cook (live-in) in her home in Smithtown, New York.

The duties of the job offered were described as follows:

> Plan menus, prepare, bake and cook meals for working couple, business and social guests as suitable for the occasion and according to recipes and considering employer's taste and dietary requirements, and purchase foodstuff.
>
> Free private room and board will be provided

A grade school education and two years experience in the job were required. Wages were $469.12 per week. (AF-1-35)

On September 11, 1995, the CO issued a NOF denying certification, finding that the job offer did not establish full time employment. Compliance by Employer would require documentation of(summarized): number and length of meals prepared daily and weekly; if need includes entertainment, prior and current schedule of same for the prior year; any duties other than cooking; evidence of prior employment of cooks; daily and weekly schedule of parents and children; any other pertinent information. The CO stated that the live-in requirement is not usually required and is unduly restrictive unless supported by business necessity. The CO, also, questioned whether the rejection of applicants Andrew M. Simko, Jr. and Dawnmarie Martino were for lawful reasons. Specifically, both appeared qualified, while additionally Ms. Martino was rejected for not being able to cook to Employer's dietary requirement, not further explained by Employer. (AF-37-42)

On October 17,1995, Employer through counsel forwarded an extensive rebuttal outlining the duties required, the allegation that Employers, particularly Mr. Rodriquez, entertained extensively, and that "..without business related entertaining, Mr. Rodriguez's ability to close deals and to manage Ryder Truck Rentals would be greatly diminished, causing a serious impact on the company's earnings and particular, on his personal earning potential". Employer contended it was difficult to obtain an exact schedule of who was entertained and on what dates nor did the law require it. A live-in was, moreover, required, since often guests stayed overnight, and breakfast needed to be served. Employer alleged substantial savings through the present live-in cook, but had no W-2 forms or of other payment to the current cook done at the advice of their accountant. Similarly, no records of payment were available for outside cleaning help, since that has been contracted for on a cash basis. Mrs. Rodriquez's mother is responsible for the child care of grandchild in seeing her off in the morning and being present upon her return. Applicant Simko was not qualified since his work on a cafeteria on an Air Force base would not prepare him to do gourmet cooking in a home. Also, he misrepresented his experience at Konig's Restaurant as full time, 1980-82, when it was actually part-time; ditto with Remson's Restaurant. Ms. Martino was rejected because she had no knowledge of Philippine foods, a dietary requirement and "..employer believes that discussion of the Filipino style cooking is a good conversation breaker which allows all participants at the business dinner to be more at ease.". (AF-43-64)

On November 7, 1995, the CO issued its Final Determination denying certification based on a failure by Employer to demonstrate through documentation that the job offer was full-time. The CO pointed out that rebuttal prepared by attorney/employer, gives a series of general statements outlining the cook's functions, number of meals prepared daily and weekly and length of time to prepare, and for whom the meals are prepared. Employer failed to submit documentation of a former or present cook. Similarly, employer failed to document the schedule of entertainment of guests on which his case seems to rest. "Employer failed to document frequency of household entertaining in the twelve(12) calender monthly period immediately preceding the filing of the application. Employer did not list the dates of entertainment, the nature of the entertainment (business or personal), the number of meals served, the time and duration of the meal...etc. Attorney/employer provides statement that these details are not possible/available at this time. Further, Attorney/employer did not provide details of school schedule of child or the daily schedule of parents." (AF-65-68)

On November 12, 1995, Employer requested review of the Final Determination by this Board, alleging primarily that the documentation required was unreasonable. (AF-69-74).

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. Gerata Systems America, Inc., 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. Collectors International, Ltd. 89-INA-133 (Dec. 14, 1989)

We find that Employer has failed to establish that the job opportunity constitutes full time employment. The household consists of only three people apparently, that would not seem to require a full-time cook as stated by the CO. Employer has not documented need for a cook for entertaining as required by the CO. In that connection, while the fairly extensive information provided in the attorney's letter demonstrates that he has frequently communicated with Employers, mere bald statements undocumented may be a basis for denial of certification. We emphasize that the burden of proof rests with the Employer, and under these circumstances find that the CO's determination is supported by substantial evidence. Dr. Vladimar Levit, M.D.,95-INA-00540(July 15, 1997)

Moreover, we note that the credibility of duties required is stretched when Employer alleges that many of his business guests stay over night and that a live-in is necessary to furnish breakfast. Moreover, this is in conflict with Employer's earlier statement that Mrs. Rodriguez's mother comes in the morning to see the daughter off to school and arrives in the evening to take care of her until the parents arrive.

Finally, the rejection of applicant Martino questioned by the CO as unlawful in the NOF but accepted by the CO in her Final Determination, was based on failure to be able to cook Philippino food, a requirement not stated in the application, and which

appeared to be a preference and not a business necessity. (See, Teresita Tecson, 94-INA-014 (May 30, 1995)

ORDER

The Certifying Officer's Denial of Certification is affirmed.

For the Panel

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JOHN C. HOLMES
Administrative Law Judge

Judge Huddleston, concurring:

I concur in the result reached by the majority, but solely on the grounds that the Employer failed to establish the business necessity for the unduly restrictive requirement. I would hold that the CO's finding that the position offered is not full-time employment is arbitrary and cannot be affirmed on that basis.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

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Cheryl Braxton, Legal Technician

BALCA VOTE SHEET

Case Name: **Alice M. Synnott**
(Claudia Olivera)

Case No. : 95-INA-235

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: